Republic v Muriuki & 3 others (Criminal Revision E168 of 2023)
[2025] KEHC 9374 (KLR) (26 June 2025) (Ruling)

Neutral citation: [2025] KEHC 9374 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CRIMINAL REVISION E168 OF 2023

EM MURIITHI, J

JUNE 26, 2025

BETWEEN

REPUBLIC ..... APPLICANT

AND

FLORA WANJIRU MURIUKI ..... 1ST RESPONDENT

JAMES BUNDI MURIUKI ..... 2ND RESPONDENT

SIMON MWAI NYAMWEA ..... 3RD RESPONDENT

LAZARUS MANYEKI MWAI ..... 4TH RESPONDENT

RULING

1. This is a ruling on an application for criminal revision filed by the DPP by letter dated which was in following terms:

> " 13th July, 2023
>
> Re: E936 of 2022 Republic v Flora Wanjiru Muriuki and 3 others (offence Of Forcible Detainer)
>
> May it please you the Honorable Judge;
>
> Reference is made to the above subject where the accused person was acquitted under Section 202 of the *Criminal Procedure Code* on 5th July 2023 by Honorable Nyaga (PM). The Prosecution submits that since the inception of the case on 21st October 2022, the matter has been scheduled for hearing once (5th July 2023). On 31st October 2021, the accused was supplied with some the prosecution material that were to be relied on during the hearing and a date f or further pretrial was set on 9th March 2023 where all material was supplied and a hearing date was set. On the 5th July 2023, when the matter came up for

hearing, the witnesses were not present when the matter was being called out. The accused was later acquitted for non- attendance by witnesses. The complainant showed up after the court session and informed the prosecution counsel that he was under the presumption that his matter was before Court once as that is where the accused took plea and therefore proceeded there to wait for their matter to be called out, only for them to learn that their matter was in Court Two at the end of the court session.

Pursuant to Article 165 of the *Constitution* of Kenya, 2010, Section 362 and 364 of the *Criminal Procedure Code*, the Prosecution humbly seeks a review of the said orders on account of irregularity and illegality, The Prosecution further submits that the complainant is desirous to get justice in this Honourable Court and prays that the matter be reinstated so it can proceed to its logical conclusion. From the foregoing, the State submits that the trial court's decision was erroneous as the court failed, ignored and or refused to grant an adjournment so that the prosecution and the Investigating Officer can avail the witnesses to court yet the case is barely months old.

Thus, we pray that the order of acquittal of the accused person be overturned as it was illegal and not properly founded on facts and the law.

Brenda Imelda Makokha

Prosecution Counsel Ii

Baricho Law Courts

For: Director Of Public Prosecution"

2. The Respondents filed a joint Replying Affidavit dated 20/1/2025 raising an issue on the merit of the case that the parcel of land is the subject of a court proceedings before the Environment and land Court and that they too are entitled to the suit land, as follows:

" Replying Affidavit

5. That the matter before Baricho Honourable Court was brought out of malice by the Complainants in the matter after we managed to secure an injunction for the Complainant not to fraudulently take over our land. (Attached herein and marked 'SMN-I is a copy of a letter directed to ODPP Kerugoya)

6. That it only to our disbelief as we were pursuing the civil suits to reclaim our father's land that the complainant used the police who arrested us and made us spend a night in cell so that they could force the matter into criminal jurisdiction and push us to give up the succession cause we were pursuing and the ELC cause. (Attached herein and marked 'SMN are pleadings for ELC Cause No 17 of 2022 And Succession Cause 550 of 2008)

7. That at all material times we dutifully and punctually attended court during the mention dates without delay.

8. That on the material date for the hearing; the court usually starts out at 9.00am and on the material date we were present in the court and the matter was called out and the prosecution indicated that she had no witnesses present.

9. That the magistrate then proceeded to acquit us based on the prosecution's statement that she had no witnesses on the material date.

10. That the acquittal was not out of malice but it was merited.

11. That we: are still in the Nyeri Law Courts and Baricho Law Courts still pursuing the land and that therefore the claim brought by the prosecution for forcible detainer was not tenable as the land ownership has not been ascertained.

12. That further we the I" and 2nd Respondents are elderly citizens and we have never been subjected through criminal proceeding.' in our early youthful stages and therefore subjecting us through the criminal proceedings ill pure torture to us both psychologically and physically as it impacts our health.

13. That we are apprehensive that if the orders sought by the Applicant is given, the we will suffer a great injustice out of the complainant's fraudulent action."

3. The Court has considered the submissions filed by the parties. For the DPP, by Submission dated 28/2/2025, the trial court is faulted for failure to make necessary inquiry as to the notice of the complainant to the hearing set for the day when he criminal case was dismissed for non appearance of the complainant as follows:

> " Section 202 *Criminal Procedure Code* provides as follows:
>
> "If, in a case which a subordinate Court has jurisdiction to hear and determine, the accused person appears in obedience to the summons served upon him at the time and place appointed in the summons for the hearing of the case, or is brought before the Court under arrest, then, if the complainant, having had notice of the time and place appointed for the hearing of the charge, does not appear, the Court shall thereupon acquit the accused, unless for some reason it thinks it proper to adjourn the hearing of the case until some other date, upon such terms as it thinks fit, in which event it may, pending the adjourned hearing, either admit the accused to bail or remand him to prison, or take security for his appearance as the Court thinks fit."
>
> The State submits that from the body of the application, it can be discerned that the victim in the case was misinformed on the place/venue on where the case was to be heard and determined and thus did not voluntarily or negligently fail to attend court. Further a perusal of the trial record reveals that the trial magistrate didn't bother to establish/satisfy himself on the factual position as to whether the victim was informed of the date and venue of hearing and deliberately failed to attend court. Thus, the State reiterates that the trial court acted suo motto and dismissed in favour of the Respondent and in contravention of the dictates of section 202 *CPC*. The Applicant submits that said trial Court's omission amounts to a procedural irregularity which the State prays that this honourable Court should intervene and remedy within the purview of its supervisory jurisdiction."

4. For the Respondents, Ms. Mokaya by submissions dated 26/4/2025 raised issue of ownership of the suit property, the suit before the Environment and Land Court and the principle of sub judice that the trial court could not deal with the trial in the face of the prior suit before the ELC. On the question of failure of the complainant to attend court, it was urged that the complainant had failed to attend court after being served with sums as follows:

> " 4. Further; In *Republic v Edwin Otineo Ocholla & another* [2018] eKLR it was held that:

"Clearly, section 202 of the *Criminal Procedure Code* applies to instances where the complainant having been summoned to attend court to testify in a case and then fails to do so, the court may acquit the accused person or adjourn the hearing of the case, depending on the circumstances that may be prevailing."

5. Your Lordship we therefore find that without any justifiable reason as to why the complainants failed to show up in court despite being served with the summons, the court acted within it's jurisdiction to have the Respondents acquitted also noting to the fact that the Respondents had diligently attended court during the mentions without fail and always on time ready to have the matter proceed to its finality. Also noting the age of the 1st and 2nd Respondent it is quite unfair to have them religiously attend court without the commitment of the complainants."

5. The Court considers that the defence of their interest in the suit property subject of the forcible detainer charge is a matter for the defence in the trial. Again, if it is contended that the charge of forcible detainer is not maintainable in view of the civil suit before the Environment and Land Court, despite the provisions of section 193A of the Criminal Procedure Act, then the respondents ought to move the High Court for appropriate relief. Moreover, the objection on sub judice ought to have been taken before the trial court, if it is contended that despite section 193A of the *Criminal Procedure Code*, the sub judice principle under section 6 of the *Civil Procedure Act* applies.

6. Section 193A of the *Criminal Procedure Code* provides as follows:

" 193A. Concurrent criminal and civil proceedings

Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.

[*Act No 5 of 2003*, s. 79.]"

7. On this application for revision, the Court is only concerned with the legality of the exercise of the authority of the trial court under section 202 of the *Criminal Procedure Code* as it expressly indicated to exercise.

8. Section 202 of the criminal Procedure Code allows the trial court to dismiss the charge if the complainant does not attend the hearing of his case "if the complainant, having had notice of the time and place appointed for the hearing of the charge, does not appear, the Court shall thereupon acquit the accused, unless for some reason it thinks it proper to adjourn the hearing of the case until some other date, upon such terms as it thinks fit".

9. The Court must be satisfied as urged by the DPP that the complainant was aware of the hearing date and place of his trial, and must be taken to have chosen to absent himself at he hearing. I would respectfully agree with the statement of Chepkwony, J. in *Republic v Edwin Otineo Ocholla & another*, *supra*, cited by the Respondents.

10. The Court has observed from the court proceedings for the day that no inquiry as to the notice on the complainant as to the hearing. It is also noted that the matter was coming for hearing for the first day, and the court ought to have indulged the complainant's request for adjournment in view of the

serious charges of matter. It is clear that a charge of forcible entry c/s 90 as read with section 36 of the *Penal Code* with the particulars that the accused "on diverse dates between 29th March 2022 and 10th April 2022 at Maitharui sub-location in KiriNyaga West sub-County within KiriNyaga County jointly in order to take possession thereof entered on the land No Mwerua/Kiana/119 of Laban Kithome Wamugunda in a violent manner by ploughing and planting crops therein", should be heard on its merits given its likely impact on the rights of property of the parties, the complainant as well as the accused and the likely result of further breach of peace arising from such dispute. The accused face a second count on interference with boundary features.

11. Significantly, the respondents assert of a right to the property does no assist the defence on a charge of forcible entry. Section 90 of the *Penal Code* provides that an offence is committed –

> "
>
> " 90. Forcible entry
>
> Any person who, in order to take possession thereof, enters on any lands or tenements in a violent manner, whether the violence consists in actual force applied to any other person or in threats or in breaking open any house or in collecting an unusual number of people, and whether he is entitled to enter on the land or not, is guilty of the misdemeanour termed forcible entry:
>
> Provided that a person who enters upon lands or tenements of his own, but which are in the custody of his servant or bailiff, does not commit the offence of forcible entry."

12. The record of the Court is clear that the trial court did not consider the issue of the notice of the complainant as to the hearing date and the likely importance of the subject matter of the criminal charges, as set out below:

> " 9/03/2023
>
> Before Hon. S.M. Nyaga (P.M)
>
> State counsel: Brenda C.A: Samuel
>
> Accused: All Present in person
>
> Interpretation: Eng/Kisw/Kik
>
> Prosecution Counsel: for hearing. I have no witnesses. I pray for another date
>
> 1st Accused: Silent
>
> 2nd Accused: Silent
>
> 3rd accused: Silent
>
> 4th Accused: Silent
>
> Court: Accused's acquitted under Section 202 Criminal Procedure code for non-attendance.
>
> S.M. NyagaS.R.M
>
> 5/07/2023."

The Court, respectfully, only considered the mechanical aspect of failure of the complainant to attend the court on the date set for hearing.

13. In failing to consider these matters, the trial Court was plainly wrong and its exercise of discretion under section 202 of the *CPC* may be corrected under the test for appellate interference with the exercise of discretion by a trial court in *Mbogo v Shah* [1968] EA 93 per De Lestang JA. (as he then was) at page 94:

> "I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

14. Consequently, the Court feels justified to exercise its supervisory powers under Article 165(6) of the *Constitution* to interfere with that discretion of the trial court under section 202 of the *Criminal Procedure Code*. On account of the orders made herein the court cannot make any observations on the merits of the applications that may be made before the trial court.

Orders

15. Accordingly, for the reasons set out above, the Court makes the following orders:

    1. The order of the trial court in Baricho Principal Magistrate's Court Criminal Case No E936 of 2022 R. v Flora Wanjiru Muriuki, James Bundi Muriuki, Simon Mwai Nyamwea and Lazarus Manyeki made on 5th July 2023 acquitting the accused under section 202 of the *Criminal Procedure Code* for non-attendance of the complainant is quashed.
    2. The trial shall proceed before the trial court differently constituted.
    3. The matter shall be mentioned at the trial court for directions as to hearing on 10/7/2025.
    4. The trial court file shall be returned to the Principal Magistrate's Court at Baricho for further necessary action.

16. File closed.

    Order accordingly.

DATED AND DELIVERED ON THIS 26TH DAY OF JUNE 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Mamba for the DPP.

Ms. Mokaya for the Respondents.